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No. —

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19,
Petitioner,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Does a railroad violate the exclusive representation principle, which is an essential foundation of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, when, over the objection of the duly designated representative of employees, the railroad deals directly with represented employees on matters which are susceptible to collective bargaining?

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Petitioner,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner District Lodge No. 19 of the International Association of Machinists and Aerospace Workers [hereinafter, "IAM"] respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the sharply divided *en banc* decision of that Court in *IAM v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988).

OPINION BELOW

The *en banc* decision of the court of appeals is reported at 850 F.2d 368 and is reproduced in the separate appendix filed with this petition as Appendix A at pages 1a-41a. The decision of the panel which was with-

drawn and vacated when the full court granted rehearing *en banc* is reported at 833 F.2d 730 and is reproduced in the appendix as Appendix B at pages 42a-63a. The district court's decision is not officially reported and is reproduced in the appendix as Appendix C at pages 64a-72a.

JURISDICTION

The court of appeals *en banc* decision reversing the permanent injunction which had been affirmed by the panel, was entered on June 22, 1988. Petitioner asked this Court to extend the time in which it may file this petition, and on September 13, 1988, that time was extended by Justice Blackmun to and including October 20, 1988. Sup. Ct. No. A-202, *IAM v. Soo Line R.R.* A subsequent extension was granted by Justice Blackmun on October 19, 1988, extending the time in which to file this petition until October 27, 1988. Those extensions totaling thirty-seven (37) days, are within the time period authorized by 28 U.S.C. § 2101(c), and this petition has been filed within that extended time period. Petitioner is seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of various provisions of the Railway Labor Act dealing with the duty to bargain established by Section 2 First of the Act, 45 U.S.C. § 152 First, and the principle of the Act that the duly designated representative of a craft or class of employees is the exclusive representative of all employees in that craft or class. That principle is expressed in Sections 2 Third, 2 Fourth, and 2 Ninth of the Act, 45 U.S.C. §§ 152 Third, 152 Fourth and 152 Ninth. Sections 2 Eighth and 6 of the Act, 45 U.S.C. §§ 152 Eighth, 156, are also relevant. Those statutory provisions have been reproduced in the separate appendix as Appendix E at pages 74a-77a.

STATEMENT OF THE CASE

This petition places before this Court another example of the prevalent tendency of courts today to examine virtually all Railway Labor Act controversies under the "major-minor" rubric [1] which frequently results in the courts declining to exercise jurisdiction over statutory violations. By applying the major-minor analysis to classify this statutory interpretation question as being a minor dispute—*i.e.*, one growing out of the interpretation of collective bargaining agreements—the Eighth Circuit has effectively deprived rail labor of a forum to enforce one of the essential foundations of the Railway Labor Act—the "affirmative duty [imposed by that Act] to treat only with the true representative, and hence the negative duty to treat with no other." *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548 (1937). Unfortunately, the circumstances giving rise to this case do not present an isolated instance, for the question raised here is recurring all too frequently today as our nation's large railroads seek to reduce their employment levels by devising and implementing unilaterally programs whereby they purchase the seniority and other collectively bargained rights of employees. *E.g.*, *Brotherhood of Railway Clerks v. Atchison, Topeka & Santa Fe Ry.*, 847 F.2d 403 (7th Cir. 1988).

This controversy is recurring today because, over the years, the railroads have entered into many agreements with rail labor that provide various forms of job guarantees to rail employees that either prohibit a carrier from reducing certain classes of employees (*e.g.*, limitations on subcontracting out of work) or require the carrier to pay wage continuation allowances to furloughed "protected" employees (*e.g.*, Mediation Agreement, dated February 7, 1965 in NMB Case No. A-7128). Those job security agreements limit a carrier's ability to reduce its forces as economically as some carriers desire, and this, along

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[1] *See*, note 6, *infra*, page 22.

with other reasons, has led to several rail carriers devising programs whereby they announce to certain classes of employees that the carrier will accept resignations from the employees, together with a relinquishment of all collectively bargained rights, in exchange for payment of a cash "separation allowance" and possibly other benefits. In this case, respondent Soo Line Railroad Company [hereinafter, "Soo"] made such an offer available to its employees, including several employees represented by petitioner IAM. It was respondent Soo's refusal to bargain with the IAM over that program and the Soo's unilateral implementation of that plan by dealing directly with the represented employees which led to the IAM's suit challenging that aciton, and has resulted in this petition.

A. Soo's Separation Pay Plan

In February 1985, respondent Soo was authorized by the railroad reorganization court supervising the reorganization of the Chicago, Milwaukee, St. Paul & Pacific Railroad [hereinafter, "Milwaukee"] to acquire the rail properties of that debtor. Soo immediately exercised that authority by having a newly-formed, wholly owned subsidiary acquire those properties, hire the Milwaukee's employees, and assume the Milwaukee's collective bargaining agreements. *See, In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 329-30 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 2460 (1987). That sale, however, was conditioned by the requirement that the Soo provide certain procedural and monetary benefits—*i.e.*, the "Appendix B" conditions—to all Soo and Milwaukee employees who may subsequently be affected by that acquisition. *Id.*, 799 F.2d at 328-29. Rail labor was dissatisfied with the Appendix B conditions imposed by the reorganization court (*id.*), and most labor organizations subsequently entered into Employee Protective Agreements with the Soo to replace those conditions; petitioner IAM entered into such an agreement with the Soo on September 10, 1985. Joint Appendix in 8th Cir. No. 86-5355 [hereinafter, "J.A."] at 132.

That Employee Protective Agreement was intended to provide:

> [F]or fair and equitable arrangements to protect the interests of Employees adversely affected by the Acquisition; and to provide for expedited changes in services, facilities, operations, seniority and existing collective bargaining agreements to enable the expanded railroad system created by the Acquisition to be operated in the most efficient manner, as one completely integrated railroad.

J.A. at 103. That agreement adopted monetary benefits comparable to those provided by the Appendix B conditions as the wage guarantees for affected employees and provided a procedure for integrating the seniority of employees who followed their work to different points on the combined system. J.A. at 105-06. In exchange for those protections, the IAM agreed that:

> Subject to the requirements hereof, the Railroad [*i.e.*, Soo] may, at its discretion, commingle the work arising from the Core Assets [*i.e.*, Milwaukee] with the work arising from its assets, and may, at its discretion, transfer work throughout its new system, subject to the Protective Conditions. . . .

J.A. at 107 at § 6. In other words, the Employee Protective Agreement gave the Soo the right to move work from one part of its combined system to another, but in exchange for that right to "commingle work," the Soo agreed to integrate seniority and to provide monetary benefits to any employee who suffered a loss of earnings as a result of that "commingling."

Approximately two months after it entered into the IAM Employee Protective Agreement, the Soo offered a "Voluntary Separation Pay Plan" to some of its employees who were represented by the United Transportation Union [hereinafter, "UTU"]. That plan was implemented on December 11, 1985, when the Soo sent a letter to UTU represented employees informing them that they were "being offered *The Soo/Milwaukeee UTU (T&C) Voluntary Separation Pay Plan* which provides

you with a lump-sum payment if you desire to resign from the company and waive all rights under Appendix B and other labor protective conditions." J.A. at 45. Employees who opted for this Plan were to receive $15,000.00 for their resignations. Also, if the employee was 60 years of age or older, and wished to retire, the Plan provided health and welfare insurance benefits until age 65. J.A. at 45.

Respondent Soo informed the district court that it devised this plan for the following reasons:

> That because of the acquisition above mentioned, Soo Line has excess employees located throughout its system of railroad. To reduce the number of employees, and to give employees an opportunity to take early retirement or seek other employment, or for any other reason, the Soo Line offered a number of voluntary separation plans to its employees, including employees represented by labor organizations.

J.A. at 41. While that Plan was initially offered only to certain UTU represented employees, it was subsequently offered to engineers represented by another organization; a total of fifty-six (56) employees accepted those offers and "terminated their services with Soo Line." *Id.* According to respondent Soo, it did not negotiate about that plan with either the UTU or engineers' Organization. *Id.*

When the IAM General Chairman responsible for dealing with the Soo learned of the Plan being offered to employees, he contacted the Soo's labor relations officer on December 12, 1985, and was informed that the plan was not applicable to employees represented by the IAM. J.A. at 133. In February 1986, however, the IAM General Chairman learned that several Soo employees represented by the IAM had entered into separation agreements under the Voluntary Separation Plan. J.A. at 134. According to the Soo, it did not solicit those separation requests, but several IAM represented employees,

having learned of the separation offers to other crafts, asked the Soo for similar separation offers. J.A. at 42. Eight IAM represented employees' requests were honored through April 15, 1986, and those eight employees, who were all over 60 years of age, resigned and relinquished all collectively bargained rights in exchange for the lump-sum payment and medical insurance benefits. *Id.*

Those eight employees did not stand alone, for "numerous individual Soo Line employees from ten different labor organizations (other than UTU and BLE [*i.e.*, the engineers]) . . . also requested the separation pay plan and signed such pay plans as individuals and left the service of the Company on a voluntary basis." J.A. at 42. As the Soo added: "The Soo Line has not negotiated with any of the ten labor organizations representing these employees concerning the Voluntary Separation Pay Plans." *Id.* However, not all employees who requested paid separations were granted their request, for the Soo's response "to the individual requests varied depending on the operating needs at the facility involved." Transcript of May 28, 1986 Hearing [hereinafter, "Tr."] at 33. In fact, a request to separate by an IAM represented employee was denied by the Soo because it needed employees at his employment point. *Id.*

Once he learned of the Separation Plan being made applicable to IAM represented employees, the IAM General Chairman contacted the Soo Line's chief labor relations officer and advised him that the IAM "believed the unliateral action" by the Soo of "entering into private agreements" with employees represented by petitioner "was a violation of the Railway Labor Act and that the carrier should cease from entering into such agreements with members of the IAM." J.A. at 134. That conversation ended with a commitment by the Soo not to enter into any further separation agreements with IAM repre-

sented employees at that time, and the parties scheduled a meeting for March 5, 1986 to discuss this issue.[2]

Several conferences were held during March and April 1986, at which time the parties discussed the Soo's proposal and the IAM's concerns regarding that program. One concern raised by the IAM was the possibility that the carrier would reduce its forces to such a low level that it would be able to contract out Machinist work under an agreement which permitted subcontracting if there was insufficient manpower at the facility to handle the work. Tr. at 16. Respondent Soo replied that it could not give any guarantees that it would not so reduce its forces. *Id.* Another area of discussion was the number of facilities where the program would be applicable and the number of employees at each facility who would be eligible for a paid separation. J.A. at 12-23, 135.

On April 23, 1986, the Soo advised the IAM that if it did not sign the proposed agreement, the Soo would put the proposal into effect beginning April 28, 1986. J.A. at 24, 135. Respondent Soo's position was stated in a letter to the IAM delivered on April 23, 1986, as follows (J.A. at 24):

> This is to acknowledge your advice to the Carrier that you object to the Carrier honoring requests by members of your organization for separation allowances without an agreement with your organization. We don't agree with your position. We have had several employees who have requested a separation and we intend to honor those requests. We do not

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[2] In its decision, the district court characterized that and subsequent conferences as "negotiations." App. C at 65a. Respondent Soo, however, maintained that the conferences were "without prejudice to the carrier's rights to unliaterally accept separation requests from Machinist employees in the event the carrier and the Machinists organization were unable to agree on a method for offering separation pay plans to Machinists." J.A. at 43.

> view this as a violation of the Railway Labor Act but taking your position into account, this will also advise you that we will not honor any such separation requests involving members of your organization prior to Monday, April 28, 1986.

B. Court Proceedings

Petitioner declined to sign the agreement proffered by the Soo and filed a complaint with the United States District Court for the District of Minnesota seeking declaratory and injunctive relief both to enforce the prohibition in the Railway Labor Act against a railroad bargaining with or entering into agreements with individual represented employees, and to enforce the Act's bargaining and status quo requirement. J.A. at 1-8. Respondent Soo answered that complaint by stating in part that it "did not violate any terms of an existing collective bargaining agreement or any provision of the Railway Labor Act by entering into voluntary separation pay plans with these individuals." J.A. at 61. According to the Soo, there were "no specific provisions governing this type of activity" in the applicable collective bargaining agreements, and therefore, the Soo cannot be said to be making "any effort to formally change terms of an existing agreement or create a new one." Tr. at 60-61. Respondent Soo then added that if a dispute under the Railway Labor Act did exist in this case, it must be a "minor" dispute subject to the exclusive jurisdiction of the adjustment boards under Section 3 of the Act, 45 U.S.C. § 153. *Id.* at 61.

Petitioner IAM moved for interim injunctive relief and the trial court, with the consent of both parties, advanced the trial on the merits pursuant to Rule 65 (a)(2), Fed. R. Civ. P., and heard two witnesses. Tr. at 3-4. On August 14, 1986, the trial court issued a decision and order permanently enjoining the Soo from entering into individual separation agreements with IAM represented employees until the railroad had complied fully with the notice and bargaining requirements set

forth in Section 6 of the Railway Labor Act. App. C at 72a. In reaching the conclusion to issue that injunction, the court first rejected the Soo's assertion that the dispute was a minor one under the labor statute. In the Court's opinion, the dispute was a major one for the following reasons (*id.* at 68a-69a):

> This is because the Court is not called upon to review the status of either labor or management at the interstices of an agreement. Instead, the case presents fundamental issues of whether or not a person may even be an employee or a member of a union. We are not defining an interemployment relationship, but the fundamental nature of the employment relationship itself.
>
> Both parties agree that there is no provision in the existing agreements between the Union and Soo Line allowing solicitation of individual union members or for individual lump-sum separation agreements. Under the *Elgin* [*i.e.*, *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945)] definition and the decisions of the other courts which have faced the jurisdictional issue in the present context, this dispute is major, and this Court therefore has jurisdiction over it.

After concluding that it had jurisdiction, the district court addressed the IAM's assertion that the Soo, by dealing directly with employees, had violated its obligation to deal solely with the IAM as the exclusive representative, and found that the IAM was correct. As the court summarized (App. C at 70a):

> If these company individual agreements were to be allowed, the union would be denied the right of access to formal negotiation concerning compensation for severance; a right secured to it by Section 6. Further, these events occur in a setting in which an existing furlough plan is in place. Under these conditions, the Court finds that Soo Line's conduct violates the RLA and its underlying policies.

Respondent Soo appealed to the United States Court of Appeals for the Eighth Circuit, but on November 12, 1987, a panel of that Court, with Judge Magill dissenting, affirmed the judgment. App. B at 42a. First, the panel looked to the claim that a statutory violation issue was asserted as the basis for the jurisdiction. The panel then stated that: "Under the RLA, the Soo Line has an obligation to bargain collectively with the Machinists' Union and to refrain from interferring with the Union's representation of its members." App. B at 47a. That obligation, the panel held, was violated here, because the Soo entered into agreements with individual employees that "have an adverse impact on the machinists as a group." *Id.* at 50a. Respondent Soo's assertion that the dispute was a minor one was rejected because "[t]he dispute does not involve interpretation of either the collective bargaining agreement or the labor protective agreement. It rather involves an effort on the part of the Soo Line to ignore both of these agreements and to negotiate individually with the employee on a matter which is a subject of mandatory bargaining." *Id.* at 51a.

Respondent Soo petitioned for rehearing and the court voted to hear the case *en banc*; at the same time, the court withdrew and vacated the panel's decision. App. A at 3a n.2. On rehearing, five of the circuit judges joined a decision authored by Judge Magill which reversed the district court because, in the majority's opinion, the "crucial" question presented by this case was whether the Separation Plan violated the Employee Protective Agreement; that issue, the majority concluded, presented a minor dispute subject to the exclusive jurisdiction of the adjustment boards. App. A at 17a, 28a. Petitioner IAM's reliance on its exclusive representative status to invalidate the Soo's direct dealing with employees was put aside by the majority's statement that this Court has spoken on this issue and "has stated, simply, that certain individual employment contracts may exist side-

by-side with a collective bargaining agreement." *Id.* at 14a. According to the majority, whether the Soo had engaged in direct dealing depended upon whether the individual separation agreements conflicted with the existing collective agreements, but only an adjustment board could determine that issue since the Soo's assertion of a "retained 'management prerogative'" to justify its individual plans was not frivolous. *Id.* at 18a, 25a. The full court thereupon reversed and remanded the case "for arbitration." App. D at 73a. Four of the judges on that court dissented in two separate opinions, one by Chief Judge Lay, joined by Judge McMillian (*id.* at 29a), and one by Judge Heaney, joined by the other three dissenters. *Id.* at 32a.

In his dissent, Chief Judge Lay noted that the fundamental question was not whether the Employee Protective Agreement may be interpreted to conflict with the Separation Plan, but "whether the railroad has a unilateral right to enter into voluntary separation agreements with individual employees that significantly affect the rights of other employees." App. A at 29a (footnote omitted). Judge Lay concluded by stating (*id.* at 32a):

> The majority opinion is simply wrong. To allow this error to persist and become precedent under the RLA will be catastrophic. The effect of the opinion is to cast distrust on the mechanisms Congress has designed to maintain industrial peace under the Railway Labor Act. . . . .

REASONS FOR GRANTING THE WRIT

I. It Is Important To The Orderly Administration Of the Railway Labor Act That This Court Clarify That The Principle Of Exclusive Representation Prohibits A Rail Carrier From Dealing Directly With Its Employees, Over The Objection Of Their Exclusive Bargaining Representative, On A Matter Susceptible To Collective Bargaining

This Court has long emphasized that one of the essential foundations upon which the Railway Labor Act has been structured is the principle that the duly designated representative of a craft or class of employees is the exclusive representative of that entire craft or class. *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548-49 (1937); *accord, Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 200 (1944). That principle of exclusive representation is also applicable to the National Labor Relations Act [hereinafter, "NLRA"], 29 U.S.C. § 151, *et seq.*, and indeed, is explicitly set forth in Section 9(a) of that statute, 29 U.S.C. § 159(a). *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937). As this Court explained in *Virginian Railway*, 300 U.S. at 548, the obligation imposed on the carrier by Section 2 Ninth of the Railway Labor Act, 45 U.S.C. § 152 Ninth, to treat with the duly designated representative of a craft or class of employees "imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other."

At the same time that the Court emphasized the negative duty to treat with no other, this Court explained that within that limit the labor statutes should not be read "as precluding such individual contracts as [the employer] . . . may elect to make directly with individual employees." *Virginian Railway*, 300 U.S. at 549; *see also, Jones & Laughlin*, 301 U.S. at 45. However, as explained below, this Court subsequently concluded that this apparent exception for individual contracts is ex-

ceedingly narrow. Moreover, petitioner IAM submits, this Court has further found that such an exception does not exist for matters susceptible to collective bargaining where the parties have not expressly reserved those particular situations for individual contracting. This case presents the question of whether there is an exception to the general exclusive representation principle that allows an employer to deal directly with its employees over the objection of the representative.

According to the court of appeals in this case, there is such an exception allowing an employer to bargain with its employees directly, over the objection of the designated representative, for contracts which do not "violate or undermine" existing collecitve bargaining agreements. App. A at 18a. That description of the scope of permissible individual bargaining, petitioner IAM respectfully submits, is contrary to decisions by this Court defining the scope of such bargaining under the NLRA,[3] which historically and logically should be applicable to the Railway Labor Act on this issue. Moreover, the court of appeals' decision is in conflict with this Court's decision in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944).

A. This Case Presents A Recurring Problem, The Correct Resolution Of Which Is Important To The Entire Rail Industry

This case does not present an isolated instance of a carrier seeking to enter into individual separation agreements with represented employees, but, rather, presents a factual situation which is occurring all too frequently today. Indeed, it is very possible that this problem will increase in its frequency in the near future as our na-

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[3] *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *accord, Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2431-33 (1987); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

tion's railroads seek to reduce their forces by "buying jobs."

Between 1970 and 1986, rail employment on Class I railroads declined by 48% (United States Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States* at 570, Table No. 978 (1988)), and that downward trend is continuing as railroads seek to reduce forces to decrease their costs. *E.g., CSX Buyout*, Journal of Commerce at 2B, col. 4 (October 4, 1988) (CSX to reduce its forces by 10,000 employees). However, rail management has in the past entered into agreements with rail labor which provide various forms of job security to rail employees. Those job security arrangements, be they a limitation on subcontracting (*see*, Tr. at 21) or a form of wage guarantee as provided by the Employee Protective Agreement in this case, limit the cost savings which a carrier can achieve when it reduces forces. It is for this reason primarily that railroads are willing to pay separation allowances to employees who are willing to sell their seniority in exchange for payments which range from $2,000.00 to $75,000.00 per separation.

Separation allowances for voluntary separations first became a problem in this industry in the early 1980's (*e.g., Brotherhood of Railway Clerks v. Chesapeake & Ohio Ry.*, 115 L.R.R.M. 3635 (N.D Ohio 1983)) and began to occur more frequently since 1985. *E.g., Brotherhood of Railway Clerks v. Atchison, Topeka & Santa Fe Ry.*, 847 F.2d 403 (7th Cir. 1988); *Southern Pacific Transportation Co. v. Brotherhood of Railway Clerks*, 636 F.Supp. 57 (D. Utah 1986); *see also, Brotherhood of Railway Carmen v. Atchison, Topeka & Santa Fe*, N.D. Texas Civil Action No. 3-88-0089-T (pending on cross-motions for summary judgment). Initially, rail labor was successful in preventing this violation of the principle of exclusive representation, but that has recently been changed by the *Soo Line* and the Seventh

Circuits' *Santa Fe* decisions' improper reliance on adjustment boards to avoid the statutory interpretation questions presented by the railroads' actions.

Since the railroads believe that they must continue to reduce forces, it is highly likely that the problem presented by this case will occur again, and most likely with a greater frequency. If the principle of collective bargaining is to be preserved in this area, it is crucial that this Court review the Eighth Circuit's decision and determine whether that decision conflicts with this Court's rulings in *Railway Express* and *Medo Photo*.

B. The Decision of the Eighth Circuit Conflicts With Applicable Decisions of This Court

Decisions by this Court since *Virginian Railway* and *Jones & Laughlin* have shown that the scope of permissible individual bargaining is exceedingly narrow and, petitioner submits, is further curtailed by the procedural limitations which the labor Acts place upon an employer's right to enter into unilateral agreements. First, in *J.I. Case*, *supra*, note 3, this Court observed that the Court in *Virginian Railway* and *Jones & Laughlin* "recognized the existence of some scope for individual contracts, but it did not undertake to define it or to consider the relations between lawful individual and collective agreements . . . ." 321 U.S. at 336. *J.I. Case* then proceeded to examine those issues, and, in particular, the relationship between lawful individual and collective agreements, explaining that a collective bargaining agreement is actually a "trade agreement" which governs the employment relationship of employees once they are hired by individual contracts. 321 U.S. at 335. Individual contracts, however, "cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreemnt." 321 U.S. at 338. The Court then added (321 U.S. at 339):

> Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of the contracts applicable, and to the Labor Board if they constitute unfair labor practices.[4]

A second limitation on the scope of individual bargaining was touched upon in *J.I. Case* and further developed that same term in *Medo Photo*, *supra* note 3. In *J.I. Case*, this Court stated that (321 U.S. at 337):

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, . . .; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. . . .

This "procedural" limitation on the right of an employer to deal directly with employees was amplified in *Medo Photo* when this Court upheld a ruling by the Labor Board that an employer had violated the NLRA by bargaining directly with represented employees on matters that were the subjects of ongoing bargaining with the certified representative. As this Court explained (321 U.S. at 684):

> The statute guarantees to all employees the right to bargain collectively through their chosen representa-

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[4] This point was relied upon by this Court in *Caterpillar*, *supra* note 3, to conclude that *all* individual contracts were not necessarily subsumed into, or eliminated by, the collective bargaining agreement. 107 S. Ct. at 2431. However, as the *Caterpillar* decision makes clear, the individual contracts in that case were made at a time that the employees were not represented. Moreover, the Court noted that a question concerning the validity of the contract is different than the question of whether the making of such a contract violated the exclusive representation principle in Section 9(a) of the NLRA. 107 S. Ct. at 2432 n.12.

> tives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found.

That principle was not new, for as the Court added (321 U.S. at 684):

> That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in *J.I. Case* . . . .

While *J.I. Case* and *Medo Photo* were not Railway Labor Act cases, in this area the Railway Labor Act and the NLRA have developed in a uniform fashion. The principle of exclusive representation is essentially the same under both Acts, and this Court has relied upon earlier Railway Labor Act cases to develop the NLRA law in this area. *See*, *Medo Photo*, 321 U.S. at 684; *J.I. Case*, 321 U.S. at 336. Thus, it is logical to look to NLRA cases to construe the scope of the exclusive representation concept under the Railway Labor Act. Indeed, this Court did just that in *Railway Express*, *supra*, which was decided on the same day that the *J.I. Case* decision was entered, for as this Court noted in *Railway Express*, 321 U.S. at 347: "The decision in J. I. Case . . . considers more generally the relation of individual contracts to collective bargaining, and much that is said in that opinion is applicable here."

Although *Railway Express* dealt specifically with the relation between individual contracts and the collective agreement, that case also involved carrier actions which were condemned subsequently in *Medo Photo*, in part, based on *Railway Express*. *See*, 321 U.S. at 684. In

Railway Express, the carrier, over the objection of the employees' representative, entered into contracts with several agents dealing with compensation, and an adjustment board subsequently sustained the union's claim that the collective agreement superseded the individual contracts. This Court ruled that the award should be enforced, in part because "the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period and . . . the carrier's efforts to modify its terms through individual agreements [were] . . . not effective." 321 U.S. at 347. Thus, *Railway Express* shows that a carrier may not bypass the collective bargaining representative or the bargaining procedures of the Act in entering into agreements with its employees.

J.I. Case, *Medo Photo* and *Railway Express* show that questions concerning the enforcement of individual contracts negotiated in conformity with the labor Acts are distinct from questions concerning the right of an employer to bypass the employees' representative in entering into such agreements in the first place. Individual contract enforcement questions may involve an issue—*i.e.*, whether an individual contract obtained as the result of an "unfair labor practice" may be used by an employer to disadvantage the employee (*see*, *J.I. Case*, 321 U.S. at 336)—which is not present in cases dealing with the lawfulness of the bypassing of the designated representative. Moreover, as occurred in both *J.I. Case* and *Caterpillar*, the individual agreement may have been entered into at a time when the employee was not part of a represented unit. Consequently, petitioner IAM submits, it is entirely improper to read *J.I. Case* or *Railway Express*, as the court of appeals did, as sanctioning the bypassing of the union to make individual contracts that may, or may not, interfere with or undermine the collective bargaining agreements.

Whether the individual contracts have such an undermining effect is immaterial to the lawfulness of the by-

passing of the union, for the evil of that action is its impact on the ability of the majority to bargain through their collective representative:

> [E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions. Collective bargains need not and do not always settle or embrace every exception. It may be agreed that particular situations are reserved for individual contracting, either completely or within prescribed limits. Had this proposed rate of pay been submitted to the collective bargaining process it might have been settled thereby or might have resulted in an agreement that the company should be free to negotiate with the agents severally. But the Company did not observe the right of the representatives of the whole unit to be notified and dealt with concerning a matter which from an employee's point of view may not be exceptional or which may provide a leverage for taking away other advantages of the collective contract.

Railway Express, 321 U.S. at 347.

In this case, the Eighth Circuit viewed the direct dealing question through the standards applicable, at best, to questions concerning an employee's efforts to enforce his individual separation agreement. But that was not the question decided by the district court, for the trial court enjoined the Soo from bypassing the IAM and the Railway Labor Act's notice, bargaining and status quo requirement. The validity of that injunction required an analysis of whether the Soo had violated the Railway Labor Act's exclusive representation principle by dealing directly with the employees, over the objection of the union, on a subject which the record shows, and the majority reluctantly agreed, was susceptible to collective bargaining. App. A at 14a; *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330,

338 (1960) ("whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves"). However, by applying the wrong standard to determine whether the Soo had impermissibly dealt directly with its employees on a collective bargaining matter, the Eighth Circuit has effectively nullified the exclusive representation principle in this and similar cases.

Railway Express is still good law, and this Court has relied upon that precedent to support the conclusion that the exclusive representation principle means that members of a represented craft or class "cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining" (*Steele v. Louisville & Nashville R.R.*, *supra*, 323 U.S. at 200), and that a carrier "may not supersede the agreement by individual contracts even though particular employees are willing to enter into them." *Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966). Nevertheless, the *en banc* Eighth Circuit has now concluded that whether a carrier can enter into negotiations with individual employees, over the objection of the union, depends on whether or not the proposed individual agreement violates or undermines an existing collective bargaining agreement. This is clearly not the proper test under the NLRA (*e.g.*, *NLRB v. Allis-Chalmers Mfg. Co.*, *supra*, note 3, 388 U.S. at 180), and, petitioner IAM submits, is not, and should not, be the test under the Railway Labor Act. Since the principle of exclusive representation is so important to the orderly administration of this essential labor statute, the Eighth Circuit's decision making that right unenforceable should be examined by this Court.

II. This Court Should Review This Case Since Both This Decision And One By The Seventh Circuit Have Severely Limited Rail Labor's Ability To Enforce The Exclusive Representation Principle Of the Railway Labor Act

Unlike the NLRA, which created an expert administrative tribunal to enforce the commands of that statute, the Railway Labor Act does not provide an administrative forum to enforce its commands. Rather, Congress has given the federal courts jurisdiction and, the IAM respectfully submits, the duty to enforce the commands of that labor statute.[5] *E.g., Chicago & North Western Ry. v. UTU*, 402 U.S. 570 (1971); *Texas & New Orleans R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548 (1930); 28 U.S.C. § 1337(a). However, in this case the *en banc* Eighth Circuit has "remanded for arbitration" the IAM's efforts to prevent the Soo from dealing directly with represented employees over the IAM's objections. App. A at 29a. Since adjustment boards under the Railway Labor Act do not have jurisdiction to enforce the Act's statutory commands (*see*, 45 U.S.C. § 153 First(i)), that remand effectively deprives the IAM of a forum in which to enforce the statute's principle of exclusive representation.

In this case, the Eighth Circuit concluded that the IAM's efforts to enforce the statute's exclusive representation principle created a "minor" dispute[6] which

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[5] This lack of an administrative forum to enforce the Act's commands also means that rail labor must look solely to the courts to construe the obligations and correlative rights imposed by that statute. Consequently, an erroneous court decision improperly limiting the protections which that Act gives employees, may have a more disastrous impact under the statute than under the NLRA.

[6] Railway Labor Act disputes over rates of pay, rules or working conditions are generally divided into two classes. Disputes over changes in agreements are "major" and are not subject to compulsory arbitration; disputes over the interpretation of existing agreements are "minor" and are subject to compulsory adjustment. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-23 (1945).

must be submitted to the adjustment boards for resolution. That dispute, according to the appellate court, was whether the individual separation agreements conflicted with the Employee Protective Agreement or with the rules agreement; but that question, as shown above, is immaterial. Moreover, both the IAM and Soo have acknowledged over and over in this case that there is no provision in any collective bargaining agreement which covers individual separation agreements. Tr. at 60-61. Consequently, there is no contractual provision which an adjustment board can construe as reserving "by agreement" certain subjects for individual contracting. *Railway Express*, 321 U.S. at 347. In other words, the adjustment boards have no jurisdiction over any aspect of this case and, thus, can add nothing to a resolution of the controversy over the validity of the Soo's bypassing of the IAM.

But even if the adjustment board were to consider the issue as framed by the Soo, it could still not resolve this controversy over the lawfulness of the Soo's bypassing of the IAM in dealing directly with the employees. According to the Soo, the Separation Plan was "outside the scope of any labor agreement with the IAM [and was] . . . an additional benefit afforded to IAM employees . . . ." J.A. at 34. That fact, the Soo asserted, meant that it had an unrestricted right to enter into such separation agreements, and any dispute over the existence of that right was a minor dispute. Even if it were assumed that the Soo had an inherent right not restricted by any contract to enter into individual separation agreements, that assumption would not justify the Soo's conduct here, for the IAM has asserted that the Railway Labor Act's exclusive representation principle outlaws direct dealing. An adjustment board has no jurisdiction to rule on the IAM's arguments regarding the parameters of the exclusive representation principle, for only a federal court can construe the scope of that principle and determine its impact on the Soo's management prerogatives.

Unfortunately, this case does not stand alone in relegating rail labor to the adjustment boards to enforce the exclusive representation principle, for recently the Seventh Circuit reached a similar conclusion in *Brotherhood of Railway Clerks v. Atchison, Topeka & Santa Fe Ry.*, 847 F.2d 403 (7th Cir. 1988). But this is where the similarity between the two cases ends, for the rationale used by the Seventh Circuit to conclude that the union's enforcement action should be submitted to an adjustment board bears no resemblance to that employed by the Eighth Circuit in this case. Indeed, both cases are irreconcilable. However, what is relevant to this petition is the total lack of clear instructions from these appellate cases to the rail industry and to the trial courts on this important and recurring issue. Moreover, those decisions have placed in question principles which were firmly established by *Railway Express* and *Medo Photo*.

Although the Seventh Circuit also required rail labor to proceed before an adjustment board to resolve the claim involved in that case, it did so for entirely different reasons than employed by the Eighth Circuit. Unlike the IAM's case, the *Santa Fe* case involved a claim that individual separation plans had, by the conduct of the parties, become "an established part of the parties' understanding of their contract"—*i.e.*, that the union had agreed to reserve certain areas for individual contracting. *Santa Fe*, 847 F.2d at 406. That claim, the *Santa Fe* courts opined, was not frivolous, and thus presented a minor dispute which had to be resolved by an adjustment board.[7] 847 F.2d at 408. The Seventh Circuit then addressed the issue of whether it should exercise jurisdiction over the union's contention that the Act's principle of exclusive representation had been violated; it con-

[7] Rail labor submits that the Seventh Circuit erred on this point, for the court, and not the adjustment board, has the obligation to determine whether a union has waived the statutory prohibition against direct dealing.

cluded that it should not because, in its opinion, the validity of the direct dealing could be determined by an adjustment board. 847 F.2d at 408-12. What that conclusion fails to take into consideration, however, is the fact that an adjustment board cannot enforce the Act's exclusivity principle.

When the two cases are compared, it becomes apparent that there is no consistent rationale upon which the rail industry can rely to determine whether direct dealing is or is not prohibited. All that the parties know is that the federal courts will not enforce the exclusive representation principle if there is an arguable basis upon which to remit rail labor to the adjustment boards. What happens at that point is beyond anyone's power to predict.

Petitioner IAM respectfully submits that this Court has long recognized that it "is a violation of the essential principle of collective bargaining . . . for the employer to disregard the bargaining representative by negotiating with individual employees . . . with respect to wages, hours and working conditions . . . ." *Medo Photo*, 321 U.S. at 684. Whether or not the Soo's conduct in this case has violated that principle is a question of statutory interpretation over which the adjustment boards have no jurisdiction.

To ask the adjustment boards to address the direct dealing question, as Chief Judge Lay stated in his dissent, "is simply wrong." App. A at 32a. And, as Judge Lay all too accurately predicted: "To allow this error to persist and become precedent under the RLA will be catastrophic." *Id.*

CONCLUSION

For the reasons set forth above, petitioner IAM respectfully requests that this Court grant the writ.

Respectfully submitted,

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